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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABEL G. NUNGARAY,

Defendant and Appellant.

B170742

(Los Angeles County
Super. Ct. No. PA 042842)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald S. Coen, Judge. Affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was charged with murder in the October 2001 killing of a liquor store owner. By the time he went to trial, he had already been convicted of robbing a liquor store in November of 2001 and wounding the owner. The prosecution introduced evidence of the November crime at the murder trial. Defendant claims this was error. He also says certain jury instructions lessened the prosecution's burden of proof. We reject defendant's claims.

BACKGROUND

The October Chalet Liquor murder.

Just before midnight on October 17, 2001, a police officer arrived at the Chalet Liquor Store on the corner of Glenoaks and Hubbard to find the owner shot to death. The murder weapon, a rifle, was subsequently found during execution of a search warrant. The owner, a 15-year-old named Torres, was a friend of defendant's. Soon after Torres bought the rifle, in October of 2001, defendant asked to borrow it. Torres agreed, but declined defendant's offer to help him commit a robbery. Defendant kept the rifle for about a week. When he returned it, he told Torres that he had shot a man at the liquor store at Glenoaks and Hubbard. He had done it because the victim refused to give him money.

After defendant borrowed the rifle again and committed another robbery, Torres stashed the rifle at a friend's house. When the police turned up with a search warrant at Torres' home, he told them where the rifle was.

Defendant told another friend (Hammond) that he had tried to steal beer from a liquor store but that the proprietor had stopped him and given him a black eye. Defendant said he was going to go back and kill the proprietor. Later, defendant told Hammond that he had done just that. Defendant did not specify which liquor store was involved.

The November Country Cousins robbery.

The Country Cousins Liquor Store was at Glenoaks and Polk, less than a mile from the Chalet Liquor Store. While the owner, an employee, and a customer were

present, defendant walked in with a rifle and profanely demanded money. Defendant fired a shot. The owner gave defendant all the money in the cash register. Defendant demanded more, but the owner showed him there was no more. As he was leaving, defendant fired another shot, barely missing the owner's head. The owner pulled out his own gun. In the ensuing battle, both defendant and the owner were wounded. The customer noted the getaway vehicle's license number.

Defendant's confederates in the getaway car (Hammond and a woman) took him to a hospital. As they arrived, the victim was being taken out of an ambulance. Proclaiming "that's the guy I shot," defendant had his cohorts take him to another hospital, where the three were arrested.

Forensic evidence established that the same weapon had been used in both incidents.

Defendant was charged with a single count of murder for the October shooting. The jury found him guilty of first degree murder and sustained a firearm enhancement. The trial court imposed consecutive sentences of 25 years to life for the murder and the enhancement for a total of 50 years to life, consecutive to the 29 years to life sentence defendant was already serving for the November robbery.

DISCUSSION

I

Defendant says evidence of the November robbery was irrelevant to any issues connected to the October murder. The trial court found insufficient similarities to allow the evidence on the issue of identity, but ruled that sufficient similarities existed to meet the lower threshold required to show common plan or scheme. Defendant argues that the only issue in the case was identity of the killer. Accordingly, he says, the impact of the evidence was to demonstrate his bad character, and nothing else. He points out that he was charged only with murder, not robbery, and that the prosecution did not present a felony-murder theory or otherwise try to show that a robbery had occurred. Thus, defendant argues, evidence showing common plan or scheme was inadmissible since the October crime involved only murder and the November crime involved robbery.

We reject defendant's argument. Notwithstanding that the prosecution did not rely on robbery in the October incident, the evidence presented the jury with two explanations for why defendant killed the Chalet Liquor owner. Hammond's testimony was that defendant did so in order to exact revenge for a thwarted theft and a black eye. Although this evidence did not specifically name Chalet Liquor, one could infer that the store was the location of the killing.

Torres' testimony was more specific. Defendant told Torres that he had shot the proprietor during an attempted robbery at the liquor store at Hubbard and Glenoaks. This specifically connected defendant to the death of the victim named in the information and showed that robbery was a motive, if not the only motive.

"In *People v. Coefield* (1951) 37 Cal.2d 865 . . . , a prosecution for murder in the course of robbery of a liquor store, the evidence was that defendant had participated in three other liquor store robberies within a month of the homicide, two before and one the night after. In each of the three others and in the one charged, the method was strikingly similar: a liquor store, late evening or early morning, a gun used to intimidate the victim, the victim forced into a back room or basement and struck with a gun to render him unconscious and permit escape. *Held*, the evidence of common method or plan . . . was relevant on the issue of intent to rob" (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 76, p. 413.)

The two crimes here were also quite similar. The same firearm was used in each robbery. Defendant fired shots during both crimes, nearly hitting the Country Cousins' owner in the head. He shot the Chalet Liquor owner in the head. The goal at Country Cousins was plainly robbery. According to Torres, that was also the goal at Chalet Liquor. The two stores were in the same general vicinity and the crimes occurred only a month apart.

The jury was instructed on both first and second degree murder. Since the prosecution did not charge robbery or rely on robbery felony-murder, it had to show a direct intent to kill plus premeditation and deliberation in order to secure a first degree conviction. A revenge killing met those requirements. A robbery motive might or might

not. The Country Cousins evidence strengthened the portrait of defendant as a trigger-happy robber who preferred to shoot his way through his crimes. A logical inference from the Country Cousins robbery was that defendant intended to kill the owner, but missed. This bolstered evidence that defendant went to Chalet Liquor intending to rob the place and kill the proprietor. The Country Cousins crime constituted relevant evidence of defendant's Chalet Liquor motive and that he had premeditated and deliberated the killing. The Country Cousins crime strengthened the evidence of premeditation and deliberation under the robbery (in addition to revenge) Chalet Liquor scenario.

The evidence was properly admitted.

II

Defendant candidly points out that he attacks certain jury instructions for the purpose of preserving the possibility of federal habeas corpus review. The jury was instructed that it could consider the Country Cousins robbery only for the purpose of showing a common plan or scheme and that it could do so if the Country Cousins robbery were shown by a preponderance of the evidence. Defendant points out that the Country Cousins evidence would constitute circumstantial evidence to be used against him in the Chalet Liquor killing. However, the standard instruction on circumstantial evidence declares that "each fact which is essential to complete a set of circumstances . . . must be proved beyond a reasonable doubt." Defendant says these two instructions cannot be reconciled and effectively reduce the prosecution's burden of proof.

As defendant acknowledges, the issue has been resolved against him by the California Supreme Court. The court held that "facts tending to prove the defendant's other crimes for purposes of establishing his criminal knowledge or intent are deemed mere 'evidentiary facts' that need not be proved beyond a reasonable doubt as long as the jury is convinced, beyond such doubt, of the truth of the 'ultimate fact' of the defendant's knowledge or intent. [Citation.]" (*People v. Medina* (1995) 11 Cal.4th 694, 763.)

As we must, we defer to the Supreme Court and reject defendant's argument.

DISPOSITION

The judgment is affirmed.

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ORTEGA, J.

We concur:

SPENCER, P.J.

MALLANO, J.